

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re,

AuditHead, LLC

Debtor(s).

John K. Fort, as Chapter 7 Trustee,

Plaintiff(s),

v.

Tryon Clear View Group, LLC
Laura Maryanne Terranova,

Defendant(s).

C/A No. 17-02989-HB

Adv. Pro. No. 19-80017-HB¹

Chapter 7

**ORDER DENYING APPROVAL
OF SETTLEMENT**

THIS MATTER is before the Court for consideration of the Application for Settlement and Compromise filed by Plaintiff John K. Fort, Chapter 7 Trustee for Debtor AuditHead, LLC, and Defendants Tryon Clear View Group, LLC (“TCVG”) and Laura Maryanne Terranova,² and the Limited Objection filed by Creditor Catherine Rotruck (“Creditor”).³ Hearings were held on December 15, 2020, and February 23, 2021, and conducted by telephone at the request of the parties. The parties ask the Court to consider the information on the case dockets in the above-captioned Chapter 7 case and adversary proceeding, and specifically call the Court’s attention to the claims filed, and the Court’s summary judgment order.⁴

Creditor filed the only proof of claim in the bankruptcy case in the amount of \$1,677,841.00.⁵ Plaintiff filed the above-captioned adversary proceeding alleging TCVG was

¹ Consolidated with Adv. Pro. No. 19-80018-hb.

² ECF No. 23, C/A No. 17-02989-hb; ECF No. 51, Adv. Pro. No. 19-80017-hb.

³ ECF No. 25, C/A No. 17-02989-hb; ECF No. 55, Adv. Pro. No. 19-80017-hb.

⁴ ECF No. 47, Adv. Pro. No. 19-80017-hb.

⁵ Creditor noted the amount could increase because the claim is unliquidated. The claim is for back wages and other damages arising from the prepetition lawsuit Creditor initiated against AuditHead and its president, John Taylor, in the Court of Common Pleas for Spartanburg County, asserting causes of action for sexual harassment and sex

created by Terranova for the sole purpose of continuing AuditHead's business while avoiding Creditor's claim. Although the complaint cites 11 U.S.C. §§ 548 and 550, it only asserts causes of action for successor liability, alter ego, piercing the corporate veil, and substantive consolidation. No specific dollar amount is asserted in the complaint. Rather, Plaintiff seeks a judgment that Defendants are liable for the debts and obligations of AuditHead. Judgment was entered in favor of Terranova on all causes of action. Summary judgment was also granted in favor of TCVG on all causes of action except a mere continuation theory of successor liability.

The settlement proposes to conclude this adversary proceeding by requiring payment of \$50,000.00 from TCVG and execution of a mutual release. The parties to the settlement, and thus the release, are Plaintiff (on behalf of AuditHead) and Defendants TCVG and Terranova. Creditor objected, arguing the release adversely and inappropriately affects her interests or is vague in scope. As a result of negotiations between Plaintiff, Defendants, and Creditor, the release language of the settlement was clarified.⁶ It now reads:

3. RELEASE OF CLAIMS. Except for the specific obligations set forth in this Agreement, in full accord and satisfaction, each Party hereby releases, discharges, and on behalf of said Party's heirs, executors, administrators, employees, agents, successors in interest and assigns from any and all claims, demands, damages, actions, causes of action, of any kind or nature, past, present or future, arising out of or connected with the Proceeding or any other claims available to the Trustee under chapter 5 of Title 11 of the U.S. Code (collectively the "Claims"), known or unknown, which were or could have been asserted by the Parties in the Proceeding through the date of this Agreement. *As defined herein, "Claims" do not include any claim under Chapter 5 of the Bankruptcy Code that may have also been asserted by a third-party, including Catherine Rotruck, under applicable non-bankruptcy law, against any entity that is not a Party or Parties under this Agreement. For the avoidance of doubt, no third-party, including Catherine Rotruck, may assert any cause of action against any Party to this*

discrimination under Title VII, violation of the Wage Payment Act of South Carolina, S.C. Code Ann. § 41-1-10 *et seq.*, promissory estoppel/detrimental reliance, breach of contract, and fraud and misrepresentation, and attaches a copy of the state court complaint. TCVG and Terranova are not parties to the prepetition state court matter and Taylor is not a party in the above-captioned proceedings.

⁶ Consideration for the release did not change. No additional notice to parties in interest is due as a result of the alteration to the language in the settlement since Creditor is the only party that filed a claim in this bankruptcy case and all relevant parties are engaged in this dispute.

agreement if such cause of action would have constituted a cause of action under Chapter 5 of the Bankruptcy Code, whether such Chapter 5 cause of action was asserted by the Trustee or not in the Proceeding.

(emphasis added to highlight clarifying language).

Creditor agrees to and welcomes the clarification in the first highlighted sentence, but objects to the last sentence in bold (“Rotruck Language”). Creditor does not want the settlement to preclude her from bringing a state court action against parties to the release to assert fraudulent transfer claims under South Carolina’s Statute of Elizabeth, S.C. Code Ann. § 27-23-10, *et seq.* (“Potential Action”). Plaintiff and Defendants assert these claims will be barred by the release and ask the Court to approve the settlement over Creditor’s objection. They state the Rotruck Language clearly memorializes their intent and if removed, then Plaintiff and Defendants will no longer have a settlement. Defendants assert Creditor is otherwise precluded from pursuing the Potential Action because it is property of the estate under § 541(a), which only the trustee has the authority to pursue under § 704(a)(1).

Section 704(a)(1) requires the trustee to “collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interest of parties in interest.” Section 554 provides:

- (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
- (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
- (c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.
- (d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

Fed. R. Bankr. P. 9019(a) provides “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” “All compromises and settlements must be ‘fair and equitable.’” *In re Alpha Nat. Res. Inc.*, 544 B.R. 848, 857 (Bankr. E.D. Va. 2016) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S. Ct. 1157, 20 L. Ed.2d 1, *rehg. denied* 391 U.S. 909, 88 S. Ct. 1649, 20 L. Ed.2d 425 (1968)). “The Trustee, as proponent of the proposed settlement, has the burden of establishing that the settlement is fair and equitable and should be approved by the Court.” *In re Final Analysis, Inc.*, 417 B.R. 332, 341-42 (Bankr. D. Md. 2009) (citing *In re Kay*, 223 B.R. 816, 819 (Bankr. M.D. Fla. 1998)). In determining whether a settlement should be approved, the Court must consider the following factors: (i) the probability of success in litigation; (ii) the potential difficulties in collection; (iii) the complexity of the litigation and the expense, inconvenience, and delay necessarily involved therein; and (iv) the interest of creditors. *Id.* at 341 (citing *Will v. Nw. Univ. (In re Nutraquest, Inc.)*, 434 F.3d 639, 644 (3d Cir. 2006)). “Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.” *Id.* (quoting *Anderson*, 390 U.S. at 424-25, 88 S. Ct. 1157).

“A court may approve a settlement over objections unless the proposed settlement falls below the ‘lowest point in the range of reasonableness.’” *U.S. ex rel. Rahman v. Oncology Assocs., P.C.*, 269 B.R. 139, 149 (D. Md. 2001) *aff’d sub nom. U.S. ex rel. Rahman v. Colkitt*, 61 F. App’x 860 (4th Cir. 2003) (discussing Fed. R. Bankr. P. 9019) (citations omitted). “A settlement should be approved if it provides for ‘the best possible realization upon the available assets . . . without undue waste or needless or fruitless litigation.’” *Id.* at 150 (quoting *In re Bowman*, 181 B.R. 836, 847 (Bankr. D. Md. 1995)). “[T]he essential inquiry which this Court must make . . . is to

determine whether the compromise reached by the parties is ‘fair and equitable’ and in the best interests of the estate.” *Id.* (citation omitted).

Although Creditor holds the only claim filed, a sole creditor does not have veto power over a settlement entered for the estate. However, if that creditor opposes the settlement terms by asserting the estate is giving up more than it should, or that her rights are being impaired, then her protest should be seriously considered and the evidence will guide the Court in considering approval.⁷

Authorities instruct the Court to accept a settlement, even over an objection, if it is fair and equitable and does not fall below the lowest point of reasonableness. However, the Court simply lacks sufficient information overall to determine if those circumstances are present here. From the record, the Court cannot determine: the probability of success in litigation; any potential difficulties in collection; the complexity of the litigation and the expense, inconvenience, or delay necessarily involved therein; or whether the settlement is fair and equitable. Additionally, the evidence does not adequately quantify the consideration and concessions given by the estate so they can be compared to the value of the benefit received in exchange.

Further, assuming the Potential Action is property of the estate, its status under § 554 is unclear. Specifically, the Court cannot determine whether Plaintiff is asserting the Potential Action is burdensome and of inconsequential value subject to abandonment under § 554, or it has value that has been considered and accounted for in exchange for the proposed settlement payment. Plaintiff and Defendants’ assertion that the addition of the Rotruck Language is essential to the settlement indicates that relinquishment may have some value. However, on this record, that is merely speculation.


⁷ The Court notes that in doing so, Creditor assumes the risks should Plaintiff elect not to proceed with the litigation or should a lesser or no recovery result.

IT IS, THEREFORE, ORDERED that the relief requested in the Application for Settlement and Compromise is denied. This denial is without prejudice to Plaintiff and Defendants' right to present any future settlement with sufficient evidence in support. Absent that event, the matter will be scheduled for trial.

FILED BY THE COURT
03/01/2021



Entered: 03/01/2021


Chief US Bankruptcy Judge
District of South Carolina